Supreme Court, U.S.
FILED
MAY 31 1991
OFFICE OF THE CLERK

No. 90-1059

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

SIMON & SCHUSTER, INC.,

Petitioner,

v.

MEMBERS OF THE NEW YORK STATE
CRIME VICTIMS BOARD, ET AL.,

Respondents,

On Writ of CERTIORARI to the United States Court of Appeals for the Second Circuit

---

BRIEF AMICUS CURIAE OF THE NATIONAL ORGANIZATION FOR VICTIM ASSISTANCE, SECURITY ON CAMPUS, INC., THE NATIONAL ORGANIZATION OF CRIME VICTIM COMPENSATION BOARDS, AND WHITE COLLAR CRIME 101 IN SUPPORT OF RESPONDANT

Charles G. Brown III
908 King Street, Suite 300
Alexandria, VA 22314
(703) 836-9405

Table of Contents

Page

Table of Authorities ii

Interest of Amici 1

Argument 2

A. A Variety of Programs, Including the Notoriety-for-Profit Law, Is Needed to Compensate Victims, Because None, by Itself, Sufficiently Compensates All Victims . 2

B. The Notoriety-for-Profit Law Is an Essential Part of Legislative Intent and Public Policy Favoring Reparations for Victims 8

Table of Authorities

California Council on Criminal Justice, "State Task Force on Victims' Rights" (Apr. 1988) 4

Carrington and Rapp, Victims Rights, Law and Litigation (Matthew Bender, 1989) 6

"A Day Short of Death, a Georgia Killer Is Given Life," The New York Times, Aug. 22, 1990 7

Doble and Klein, *Punishing Criminals, the Public's View, An Alabama Survey,*
(Edna McConnell Clark Foundation, 1989) 7

Kilpatrick, et al., Victims Rights and Services in South Carolina: The Dream, the Law, the Reality, Final Report (Crime Victims Research and Treatment Center, Univ. of South Carolina, Mar. 31, 1989) 4

Poklemba and Abate, "Restitution in New York State: Recommendations for Improvement, A Joint Report to the Governor and the Legislature" (June, 1988) 4

Smith, "Victim Compensation: Hard Questions and Suggested Remedies," 17 Rutgers L.J. 51 (1985) 4

Smith, Davis, and Hillenbrand, "Improving Enforcement of Court-Ordered Restitution," a study of the American Bar Association, Criminal Justice Section, Victim Witness Project—(Aug. 1989) 4

Stark and Goldstein, *An ACLU Handbook of the Rights of Crime Victims* (Bantam Books,1985) 8

United States Department of Justice, National Institute of Justice, *When the Victim Is a Child*, (1985) 4

Interest of Amici

The National Organization for Victim Assistance, founded in 1975 and based in Washington, D.C., is a national nonprofit membership organization dedicated to improving the rights and services for victims of crime through national advocacy, victim counseling, professional education, and membership support.

Security on Campus, Inc., is a national nonprofit corporation, organized under the laws of Pennsylvania, whose purpose is to enhance security from violence on colleges and universities nationwide, and to give a voice to student victims of such violence.

The National Association of Crime Victim Compensation Boards, a nonprofit organization founded in 1977, consists of the agencies handling victim compensation funds in 47 states—soon to be 49—plus the District of Columbia, and the Virgin Islands. It works to develop better methods for the administration of victim compensation statutes, and promotes the interchange of ideas and experience among the compensation programs.

White-Collar Crime 101, based in Vienna, Virginia, promotes public education and awareness regarding the prevention of white-collar crime, and provides resource material and referral service for victims of economic crime.

Amici[1] are organizations that work on behalf of victims of crime. They believe that protection and enhancement of the rights of victims of crime need to be a major goal of the criminal and civil justice systems. One of these rights is the recovery of financial losses that crime imposes on victims.

Amici ask that the decision of the Second Circuit be affirmed because the New York Son of Sam law—or "Notoriety-for-Profit" law, as the amici prefer to characterize it—and

---

[1]Letters of consent to the filing of this brief have been received from petitioner and respondent, and are being filed with the Clerk of the Court pursuant to Rule 37.3.

similar statutes in other states, are an essential part of a societal interest in compensating victims for the losses they suffer from crime; and because these laws target the responsible party, the perpetrator, to pay for these losses.

Argument

Crime takes a major toll on society, but the burden is not evenly borne. It is the victims of crime and their families who suffer the direct physical harm, emotional trauma, and financial losses. Without reparations for their losses, the agony of victims is prolonged, often permanently. It has long been accepted in the law that where the criminal has assets by which to reimburse the victim, he or she should be ordered to do so. More importantly, where those assets are obtained by exploiting the crime itself, any efforts to thwart reparations are intolerable.

A. A Variety of Programs, Including the Notoriety-for Profit Laws, Is Needed to Provide Reparations for Victims Because None, by Itself, Sufficiently Compensates All Victims

Judicial and legislative developments throughout the Twentieth Century have enhanced the rights of those accused of crime. Only recently have legislatures and courts begun major steps to protect victims of crime. The subject of victims' rights was not recognized in jurisprudence, or in law school curricula, or in most American courtrooms until after 1975, when the National Organization for Victim Assistance was founded.

In the recent past, legislative attention has focused on how to make financial reparations to victims. The achievement of economic recovery for victims has been an elusive goal; the experience of the past two decades indicates that no system, standing alone, reaches all victims. Therefore, *all* approaches are needed to meet the societal goal of reparations for victims.

1. Victim Compensation Programs

Victim compensation by the state is hardly a new idea—

the Code of Hammurabi in 2038 B.C. required a city to compensate anyone victimized by crime within its gates. The idea was rediscovered 4000 years later when New Zealand adopted victim compensation in 1963, followed by California in 1965. Gradually, one state after another adopted laws creating victim compensation programs, which now exist in 47 states, the District of Columbia, and the Virgin Islands. Mississippi's program will begin July 1, 1991, and South Dakota's on July 1, 1992, leaving only Maine as a state without a statutory victim compensation system.

Victim compensation programs are the linchpin of reparations for the worst casualties of crime, providing financial assistance to tens of thousands of injured victims, or their survivors, each year. The programs pay for medical bills, lost wages, funeral expenses, and other out-of-pocket losses not reimbursed through other means, such as insurance or recovery from criminals or liable third parties.

The financial burden on victim compensation boards is enormous, sometimes to the breaking point. Indeed, Nebraska was forced to discontinue its program for a year during a recent economic downturn. To the extent that Notoriety-for-Profit laws reduce the financial pressure on these boards, they help all victims of violent crime—not just the victims of criminals who become successful co-authors.

Victim compensation boards, while helpful to countless victims in the 1980's, simply cannot be looked to as the sole solution to making victims whole:

(1) Forty-seven of the 49 jurisdictions have caps on recovery, 15 of them at $10,000 or less. In light of today's health care costs, victims' needs could far exceed that figure.

(2) The statutes cover violent crimes only. Victims of property crimes, from burglary to white-collar frauds, are not eligible.

(3) With very limited exceptions, the statutes do not permit payment for property losses associated with a violent crime.

(4) Forty-five of the 49 jurisdictions allow no recovery for pain and suffering and other general damages. Child victims, for example, could be reimbursed for counseling, but the programs are unable to address all of the long-lasting effects. See, for example, United States Department of Justice, National Institute of Justice, *When the Victim Is a Child* (1985).

The inconsistencies inherent in these programs, which have such limited resources to deal with such a massive societal problem, are analyzed in Smith, "Victim Compensation: Hard Questions and Suggested Remedies," 17 Rutgers L.J. 51 (1985).

Even if victim compensation covered all the losses of all the casualties of criminal violence, it would still be far fewer than 10 percent of all victims who would be compensated.

2. Restitution

Restitution has witnessed a substantial increase in usage by federal and state courts in recent years. Like victim compensation, court-ordered restitution has provided some recovery to many victims. But restitution, too, has met with only limited success, according to the four leading studies on its use:

(1) Kilpatrick, et al., *Victims Rights and Services in South Carolina: The Dream, the Law, the Reality, Final Report* (Crime Victims Research and Treatment Center, University of South Carolina, Mar. 31, 1989) (hereafter "the South Carolina study);

(2) Smith, Davis, and Hillenbrand, "Improving Enforcement of Court-Ordered Restitution," a study of the American Bar Association, Criminal Justice Section, Victim Witness Project (Aug. 1989) (hereafter "the ABA study");

(3) Poklemba and Abate, "Restitution in New York State: Recommendations for Improvement, A Joint Report to the Governor and the Legislature" (June, 1988) (hereafter "the New York study"); and

(4) California Council on Criminal Justice, "State Task Force on Victims' Rights" (Apr. 1988) (hereinafter "the California study").

The South Carolina study, the most complete to date,

lauds the legislature for its statute aimed at a creating a comprehensive effort to require restitution from criminals to victims. Even within such a legislative framework, the results were disappointing. Only 22 percent of case files with guilty pleas or verdicts contained restitution orders, and *only 10 percent of crime victims in cases with guilty defendants received any restitution*.

The other studies presented similar results. The ABA study, which looked at programs in Alabama, Minnesota, and Utah, pointed to the massive numbers of defendants without assets, and suggested that restitution be based on the ability of criminals to pay. The California study pointed to the inconsistent results across the state, while the New York study said defendants often had the ability to pay something but were not required to. The New York study, like the ABA study, noted that restitution, even when successfully implemented, would normally bring only small sums of money to the victim.

Even if full restitution were uniformly ordered and those subject to such orders were wiling and able to fulfill the orders, fewer than ten percent of all victims—the minority whose offenders were brought to justice—would be restituted. And some of their payments would reimburse the state's compensation program—that is, there is an overlap between the small minority which might be restituted and that which might be compensated by the state.

All in all, the assertion by petitioner that restitution is a meaningful substitute for a Notoriety-for-Profit law is belied by the four studies. The offender who earns a long prison sentence gains little except, perhaps, the avoidance of having to pay his debt to his victims as well as society, But thereafter publishing and producing films often can bring huge sums of money for the convict, as the book *Wiseguys* and film "Goodfellas," doubtless has done.

It is absurd, then, to equate the restitution remedy with the Notoriety-for-Profit remedy—only the latter has any realistic prospects of bringing sufficient financial remuneration to the

victims of Henry Hill, the mobster who is the subject of the books in question. Of course, in the unlikely event that Mr. Hill had previously made some amount of restitution to his victims, these sums would be deducted from any civil judgment arising out of the Notoriety-for-Profit law; the two legal devices operate as complementary methods to achieve redress, not mutually-exclusive options.

3. Civil Litigation

Civil litigation can proceed in two ways—against the defendants or against liable third parties. Examples of the latter could be shopping malls which provide inadequate security in their parking lots, or taverns that serve intoxicated persons who then return to their cars and commit a drunk-driving offense.

A tremendous growth has occurred in successful litigation against both criminal defendants and liable third parties; see, generally, Carrington and Rapp, *Victims Rights, Law and Litigation* (Matthew Bender, 1989).

But civil litigation depends on the criminal having been identified and (usually) convicted, and a deep pocket or there being a liable third party. In most crimes, neither is the case; again, it is worth noting that fewer than ten percent of *reported* crimes result in an authoritative identification of the offender—while a majority of crimes are not reported to the authorities (which remains a crude but telling index of how much faith Americans place in their institutions of justice).

4. Other Programs to Help Victims

The past decade has witnessed explosive gains in victim services. All United States Attorneys' Offices have a victim/witness coordinator, as do many state district attorneys—some at a ratio of one victim advocate for every three felony prosecutors.

Services aimed at helping particular types of victims, such as children, domestic violence victims, sexual assault victims, and the survivors of the victims of homicide, have been

created in most of American communities. Victim support groups have been created to help victims with their emotional and legal needs, groups such as those affiliated with the amici and with, as examples, Incest Survivors Resource Network International (Hicksville, New York), Mothers Against Drunk Driving (Arlington, Texas), National Assault Prevention Center (Columbus, Ohio), National Center for Missing and Exploited Children (Arlington, Virginia), National Coalition Against Domestic Violence (Washington, D.C.), National Coalition Against Sexual Assault (Washington, D.C.), National Institute Against Prejudice and Violence (Baltimore, Maryland), Parents of Murdered Children (Cincinnati, Ohio), and Spiritual Dimension in Victim Services (Sacramento, California).[2]

These organizations and the local programs they represent are all helpful to victims, but they do not, and cannot, deal with the financial losses that victims suffer from crime.

Only real money can do that, money from taxpayers, third parties, or law violators. It is the soundest public policy to look first to the law violator for the money, which is precisely what the Notoriety-for-Profit law does.

B. The Notoriety-for-Profit Law Is an Essential Part of a

---

[2]It is a myth that victims invariably want to see the harshest possible treatment of law violators. Last year, an execution was commuted in Georgia at the request of the victim's family. "A Day Short of Death, a Georgia Killer Is Given Life," New York Times, Aug. 22, 1990, p.1. An Alabama study indicates that if intermediate alternatives were available between prison and no punishment (e.g., boot camp, house arrest, strict probation), the public quite often would support the middle ground over prison. Doble and Klein, *Punishing Criminals, The Public's View, An Alabama Survey* (Edna McConnell Clark Foundation, 1989).

Legislative Intent and Public Policy Favoring Reparations for Victims

When enacted, the Notoriety-for-Profit laws received universal support. An American Civil Liberties Union Handbook, *The Rights of Crime Victims*, by Stark and Goldstein (1985), devoted an entire chapter to these laws, indicating their importance to victims, and warmly praising such statutes:

> "While such payments are made to very few criminals and Son of Sam laws will not assist the vast majority of victims in recovering damages, the very notoriety of the crimes that do attract such large payments make Son of Sam laws important symbols to some people that criminals will not be permitted to profit from their crimes." (at p. 267)

The ACLU Handbook also addressed the issue of the constitutionality of the statute, concluding that the laws "probably [do] not" violate the First Amendment (p. 276). The authors note that "as a practical matter, such statutes have not deterred either criminals or publishers from publishing such stories." (Id.)[3]

Obviously, no deterrent to publish occurred with the mobster life of Henry Hill. Petitioner has undoubtedly made substantial sums on this work, and it is at least possible that there will be money left in the till for Mr. Hill after his victims are finally paid. Whether the publishing community, and criminals with a writing talent or a ghostwriter provided by the publisher, could make even more money without such a law is not relevant.

What is relevant is that the chilling effect, even if it can be identified in theory, does not exist in practice. This book and many others have been published with a Notoriety-for-Profit law

---

[3]To the extent that the Handbook represents official ACLU policy, the ACLU did not indicate in its amicus brief why it now takes a different position.

in place for years.

The Notoriety-for-Profit law fills one gap in a skein of reparations provisions that does not otherwise exist. First, to the victims, it is of great procedural advantage. The statute of limitations for intentional torts is one or two years in most jurisdictions, so without the Notoriety-for-Profit law, the infamous criminal merely needs to wait a year or so before he transforms his past cruelties into large sums of money, and then humiliate his victims—on the printed page, on the silver screen, and once again, in their pocketbook.

Second, the law cures the problem of the criminal acting elusively to shield assets from the victim, such as by having the publisher pay another party or deposit the money in a bank account in some Caribbean island nation.

Finally, the law redresses the horrid inequity of criminals getting rich from their crimes while victims lack the means to recover financially from the disaster that befell their lives.

In sum, the case before the Court has nothing to do with the rights of free speech. The law in question allows Henry Hill and his ghostwriter to recount all the obscenities of his life, without molestation, in return for as much money as the public will pay them.

What the case *does* engage is a matter of creditors' rights: may New York intervene to say that certain debtors cannot avoid paying what they owe by squirreling away their assets either through phoney assignments or delayed realizations of their profits? Debtors, that is, whose sole means of earning more than prison wages is selling their tales of predation and viciousness?

To simplify the question: may New York require Henry Hill and Simon & Schuster to repay debts owed to Hill's victims before the mobster and the publisher reap all the profits of his belated, lurid confessional?

Conclusion

For a decade and more, however belated the starting point, state legislatures and Congress have taken major steps to

assist the 30 million annual victims of crime. The essence of their jurisprudence is to accord a measure of justice to crime victims—justice that compares, not competes, with the justice they have long accord accused and convicted victimizers. This Court has the opportunity to ensure that their legislative framework stays in place.

It would be tragic indeed if the Court used this case to set back the agenda for rights of victims of crime.

Respectfully submitted,

Charles G. Brown, III
908 King St.
Alexandria, Virginia 22314